Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

CASE FARMS OF NORTH CAROLINA, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID PARKS HILLER
Counsel of Record
MILLISOR & NOBIL
4700 Lakehurst Court
Suite 135
Dublin, OH 43016-2251
Telephone 614/799-2020
Facsimile 614/799-2121

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

Whether the National Labor Relations Board's presumption that all voters are "capable of recognizing campaign propaganda for what it is and discounting it" should be woodenly applied to non-English-speaking alien voters who are uniquely vulnerable to scare tactics.

Whether unions should be given free rein to use deliberate misrepresentations to terrorize non-English-speaking alien voters and then hide behind the Board's *caveat emptor* approach.

PARTIES

Petitioner Case Farms of North Carolina, Inc., is a subsidiary of Case Foods, Inc., of Salisbury, Maryland.

Intervenor National Poultry Workers Organizing Committee is affiliated with the Laborers International Union of North America, a labor organization headquartered in Washington, D.C.

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PETITION FOR WRIT OF CERTIORARI

Case Farms of North Carolina, Inc. ("Case Farms") prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on October 23, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is published at 128 F.3d 841 (4th Cir. 1997) and reprinted in the Appendix hereto ("App. A") at page App. 1. By order filed December 19, 1997, the Fourth Circuit denied Case Farms' petition for rehearing and suggestion for rehearing *en banc*. A copy of the order denying rehearing is reprinted in the Appendix at page App. 24. The Fourth Circuit enforced an unpublished order of the National Labor Relations Board which is reprinted in the Appendix at page App. 26.

JURISDICTION

On December 12, 1995, the National Labor Relations Board ("NLRB") summarily adopted a September 12, 1995 Report overruling Case Farms' objections to Union misconduct adversely affecting a July 12, 1995 election. In order to test the NLRB's certification of the Union, Case Farms refused to bargain, whereupon the NLRB ordered Case Farms to bargain on March 7, 1996. On October 23, 1997, the United States Court of Appeals granted enforcement of the Board's bargaining order pursuant to § 10(e)

of the Labor Management Relations Act, 29 U.S.C. § 160(e). On December 19, 1997, the Fourth Circuit filed an order denying Case Farms' petition for rehearing. Jurisdiction is conferred upon the Supreme Court of the United States to review the judgment of the Fourth Circuit upon writ of certiorari by 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

Section 9(c)(1) of the National Labor Relations Act, 29 U.S.C. § 159(c)(1), reprinted at App. 29, requires the National Labor Relations Board to hold secret ballot elections and certify the results thereof.

STATEMENT OF THE CASE

This case arises out of an election conducted by the NLRB at Case Farms' poultry processing plant at Morganton, N.C. The work force at Case Farms' Morganton plant is overwhelmingly Hispanic. Indeed, fully 80 percent of the 514 employees eligible to vote in the July 12, 1995 election were Hispanic immigrants. More to the point, 70 percent of the voters were non-English-speaking aliens who had spent little time in the U.S. The Union's chief organizer (Yanira Marino) admitted that the Case Farms' alien voters "didn't know English." The Union imported seven Spanish-speaking organizers and each item of Union campaign propaganda was printed in Spanish. Given the demographics of the work force, it is understandable that the Union centered its campaign upon Hispanic voters. Unfortunately, however, the Union

elected to take advantage of the fact that Hispanic alien voters were highly vulnerable to scare tactics.

Shortly before the election, the Union distributed a flier which was carefully crafted to instill fear among *Hispanic voters*. In a cynical effort to prey upon the inability of Hispanic aliens to verify the truth or falsity of events which occurred hundreds of miles away, the Union's handout falsely proclaimed *inter alia*:

> IN OHIO, TWO YEARS AGO CASE FARMS FIRED THE ENTIRE AMISH WORK FORCE, AND REPLACED THEM WITH LATINOS.
>
> * * *
>
> HOW ARE WE GOING TO PREVENT CASE FARMS FROM TREATING US LIKE THE AMISH?

The Union's claim that Case Farms "fired the entire Amish work force" in Ohio is absolutely false! The record evidence is uncontroverted that Case Farms did not fire a single Amish employee! Indeed, the record evidence is uncontradicted that Case Farms made Herculean efforts to retain its Amish workers in Ohio. The testimony of the Union's chief organizer (Yanira Marino) makes it crystal clear that the Amish flier was a baseless misrepresentation:

> Q. [MR. HILLER] *Do you have any proof today that Case Farms fired the entire Amish work force in Ohio two years ago, or at any time?*
>
> A. [MS. MARINO] *No, I don't have any proof of that.*

The Union apparently expected these non-English-speaking voters to somehow verify the mass firing claim

for themselves. As we shall see, the inability of non-English-speaking aliens to verify events which occurred hundreds of miles away in a strange country is at the very core of this case.

ARGUMENT

The United States currently houses over 11 million aliens and in 1996 the INS reported that petitions for work visas rose by 20 percent over 1995. Alien workers have become a permanent fixture in the American workplace and some industries are now dominated by alien workers. Correlatively, more and more voters in elections conducted by the National Labor Relations Board will be non-English-speaking aliens.

This case asks whether the National Labor Relations Board's presumption that employee voters are "capable of recognizing campaign propaganda for what it is and discounting it" should be inflexibly applied to all non-English-speaking alien voters. The answer to this question will determine whether labor unions may freely utilize deliberate misrepresentations to terrorize non-English-speaking aliens and then hide behind the Board's *caveat emptor* doctrine.

In the case of *Q. B. Rebuilders, Inc.*, 312 NLRB 1141 (1993), the NLRB recognized that a workforce comprised of Hispanic aliens was "overwhelmingly vulnerable" to union scare tactics. Indeed, the law has often recognized the burdens inherent in being a non-English-speaking alien. *See Hampton v. Mow Sun Wong*, 425 U.S. 88, 102

(1976) (aliens are "often handicapped by a lack of familiarity with our language and customs"); *U.S. v. Mosquera*, 816 F.Supp. 168, 175 (E.D. N.Y., 1993) (non-English-speaking Hispanics are at a "substantial disadvantage" in understanding their legal rights); *U.S. v. Patino*, 649 F.2d 724, 727 (9th Cir. 1981) (language barriers inhibited alien's understanding of his legal rights); and *U.S. v. Williams*, No. 91-1989, U.S. App. (6th Cir., May 19, 1992) (unreported) ("language barriers and cultural limitations" make aliens more susceptible to being duped).

Unfortunately, both the NLRB and the three-judge panel refused to accord any significance to the unique vulnerability of non-English-speaking alien voters and applied a rigid presumption that all voters are completely interchangeable. According to the Board and the three-judge panel, the contestants in a union election are free to use deliberate misrepresentations to terrorize alien voters so long as they do not attempt to incite racial or ethnic prejudices among such voters.

The Union's Purpose Was to Create Fear of Job Loss.

The implication of the Amish flier was clear: absent the protective mantle of the Union, Hispanics in Morganton would lose their jobs just like the members of a religious sect (the Amish) were allegedly purged in Ohio. ("HOW ARE WE GOING TO PREVENT CASE FARMS FROM *TREATING US LIKE THE AMISH*?") The prospect of losing their jobs raised the spectre of serious economic harm to Hispanic alien voters. *See Q. B. Rebuilders, Inc.*,

312 NLRB 1141 (1993) (the prospect of job loss "constitutes a serious threat of harm economically" to Hispanic alien voters).

The brief submitted to the Fourth Circuit by the National Labor Relations Board candidly admitted that the Amish "leaflet certainly suggested that the *job security* of the [Hispanic] employees would be in jeopardy." (Brief p. 23.) The obvious purpose of the Union's misrepresentation was to instill fear. Not surprisingly, the Union did not offer one scintilla of record evidence suggesting a proper purpose for their misrepresentation.

The Vulnerability of the Alien Voters.

Case Farms has never questioned the native intelligence of its Hispanic employees. If they spoke English and had the advantage of life-long familiarity with the protections afforded by federal employment laws, this would be a very different case. However, the unvarnished truth is that over 350 voters were aliens who did not speak English and had no realistic means to determine whether they could lawfully be purged like the Amish had allegedly been purged in a far-away place called Ohio.

The record evidence is uncontroverted that the 350 alien voters could not read U.S. publications or understand U.S. news reports. Consequently, they did not understand the protections afforded by U.S. employment laws. Union organizer Yanira Marino acknowledged that Case Farms' Hispanic employees *"didn't know English and they didn't know the laws of the United States."* However, Ms. Marino failed to explain how these same alien voters

could verify whether the laws of the United States would permit Case Farms to treat them in the same arbitrary manner as the Amish had allegedly been treated in Ohio. Moreover, the Union stipulated that "many Guatemalan workers fled Guatemala under difficult circumstances, including the civil war, fleeing poverty, and many came to the United States seeking political asylum. They were used to exposure to different kinds of atrocities that have been committed against them, including guerilla rebels, government forces, and others in Guatemala." It would stand to reason that aliens who are accustomed to being abused in their native country would be uniquely susceptible to predictions of further abuse in a foreign country whose laws they do not understand.

The Three-Judge Panel Inflexibly Applies *Midland*.

Unfortunately, both the NLRB and the three-judge panel failed to accord any significance to the unique vulnerability of the Hispanic voters. Both analyzed the case as though it consisted merely of garden variety campaign "puffing" to seasoned American workers. The opinion of the three-judge panel held that because the Laborers neither accused Case Farms of bigotry nor attempted to arouse any prejudices of Latino voters against Anglo owners, the Board properly *ignored the misrepresentations* no matter how much they may have terrorized non-English-speaking Hispanic aliens:

> * * * In *Midland* [*National Life Ins. Co.*, 263 NLRB 127 (1982)], the Board finally settled on the standard that "we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections

aside on the basis of misleading campaign statements." * * *

* * *

In *Sewell Mfg. Co.*, 138 NLRB 66, 70 (1962), the Board established that "a deliberate, sustained appeal to racial *prejudice*" could create conditions that "made impossible a reasoned choice of a bargaining representative." * * *

* * *

Accordingly, a party violates the standard set forth in *Sewell* only if its campaign propaganda constitutes an inflammatory appeal to racial or ethnic sentiment. Otherwise, the propaganda is unobjectionable under the permissive *Midland* standard. * * *

* * *

Thus, the truth or falsity of the Amish flier may be put aside because, as the Board found, "the materials distributed by the [Union] did not constitute an inflammatory appeal to race or ethnicity." J.A. 347 n.1. * * * The flier makes no claim that Case Farms is bigoted or prejudiced * * * nor does it attempt to "inflame" the employees against another racial or ethnic group.

* * *

* * * Although there is evidence that a claim made in the Amish flier was a misrepresentation, *the Board has recognized that employees are "mature individuals who are capable of recognizing campaign propaganda for what it is and discounting*

> *it." Midland*, 263 NLRB at 132 (quoting *Shopping Kart*, 228 NLRB at 1313) * * * . * * *

128 F.3d 841, 844-49 (emphasis supplied).

If the opinion of the three-judge panel is correct, then America's labor unions will be armed with the stamp of judicial approval to use deliberate misrepresentations to frighten non-English-speaking alien voters so long as the union does not accuse the employer of bigotry or seek to inflame any prejudices the aliens have against the members of another racial or ethnic group. The Fourth Circuit's opinion assumes that non-English-speaking Hispanic aliens are "capable of recognizing campaign propaganda for what it is and discounting it" and applies doctrines which are geared to seasoned American workers.

Two prior decisions of the NLRB suggest that inflexible application of the *Midland-Sewell* doctrines is inappropriate when the electorate consists of non-English-speaking aliens. The first case is *Q. B. Rebuilders, supra,* which explicitly recognizes the vulnerability of Hispanic aliens to scare tactics. The second case is *Zartic, Inc.*, 315 NLRB 495 (1994). *Zartic* involved an election in two poultry processing plants in Rome, Georgia. There were 544 voters. About 50 percent of the voters at one plant and at least 75 percent of the voters at the second plant were Hispanic immigrants, most of whom could not read or speak English. In an effort to generate ethnocentric fear among Hispanic voters, the Union falsely suggested a connection between the employer and Ku Klux Klan violence which had occurred at another of the Company's plants in another city. The analytical test set forth in

Zartic was whether the "intent" and "likely effect" of the Union's misrepresentation was to *frighten* Hispanic voters.

Applying this test, the Board found that "*the Union's intent was to exploit the ethnic fears of the Hispanic employees* by making a visceral connection between the KKK and working conditions." *Id.*, at 498. The Board also found that the "likely effect" of the Union's misconduct was to destroy the "laboratory conditions" for an election.

According to the opinions of the NLRB and the three-judge panel, *Midland sanctions* a Union's use of lies to frighten Hispanic alien voters so long as the Union does not attempt to incite prejudice against Anglo owners. This reasoning simply does not square with the result in the *Zartic* case. Using the three-judge panel's "logic," the *Zartic* election would *not* have been set aside because the Union did *not* try to create Hispanic prejudice against Anglo owners. Thus, *Midland* would have rendered wholly irrelevant the Union's lie that the employer and the KKK were in cahoots. But that's not what happened in *Zartic*. The Board set the election aside in Zartic not because the union lied but because the union employed a lie to instill ethnic fear. The opinion of the three-judge panel would unwittingly turn *Midland* on its ear and have it stand for the proposition that a union may instill fear in voters so long as it uses *Midland*-protected misrepresentations to do it. As demonstrated by the result in *Zartic*, the *Midland* doctrine applies to cases where the challenge is limited solely to the fact that campaign propaganda is untrue – not cases such as this where the central issue is whether the Union used lies to instill *fear* in vulnerable alien voters.

The Three-Judge Panel Misapprehends the Amish Flier.

The three-judge panel clearly misapprehended the thrust of the Amish flier. According to the opinion of the three-judge panel:

> If there is any "ethnic" content to the flier at all, it is at most an appeal to Latinos in North Carolina to *avoid the fate of Latinos in Ohio, namely, being paid less and treated worse.*

128 F.3d 841, 847.

With all due respect, the Amish flier warned the Latinos in North Carolina to "avoid the fate" of the purged Amish – not the Latinos who took the jobs of the Amish. The Union's flier asked: "How are we going to prevent Case Farms from treating us like the [purged] *Amish*?" The three-judge panel misreads the flier as though it asked: "How are we going to prevent Case Farms from treating us like they treated the underpaid, mistreated Latinos in Ohio?" Because of this error, the panel misinterprets the Amish flier as a call for "ethnic solidarity" (as opposed to a thinly-veiled effort to cause fear of job loss in Hispanic voters).

The NLRB's Double Standard.

While scoffing at the scare tactics directed at Case Farms' Hispanic workers, the NLRB recently demonstrated exaggerated concern for protecting seasoned American workers from far more legitimate campaign tactics. On November 9, 1997, the Board rendered its decision in the case of *Eldorado Tool, Division of Quamco, Inc.*, 325 NLRB No. 16, 1997 NLRB LEXIS 884. In *Eldorado*

Tool, the employer posted a series of drawings of tombstones, each bearing the name of a unionized plant which had closed. Just before the election, the employer posed the question of whether the union might cause the closure of Eldorado's plant. (It is certainly not unheard of for union strikes and/or unreasonable bargaining demands to eventually lead to plant closures.) Notwithstanding the legitimacy of the plant closure issue, the Board set the election aside, saying:

> * * * Every day or two, the Respondent would add another tombstone with the name of another closed plant. On March 1, the day before the election, the Respondent posted a tombstone with the name "Eldorado" on it, and a question mark in the middle. * * *
>
> The judge found that the display was *factually accurate; the plants specifically mentioned in the display were closed, and the employees had been represented by the UAW at the time of their closing.* Because, in the judge's view, there was no prediction that the same thing would occur at Respondent's facility, the judge found that these *factually accurate statements* were protected under Section 8(c). * * *
>
> * * *
>
> We find that the logical inference to be drawn from the expanding cemetery of UAW-represented plants is that the same fate of plant closure and job loss awaited Eldorado. * * * In our view, * * * the Respondent was clearly implying that the employees had the fate of the Company in their hands and the question was whether or not the employees would choose to

> avert a closing or job loss by voting against the Union.

1997 NLRB LEXIS 884 [*5-6 and *8].

Comparing the *Case Farms* and *Eldorado* decisions, the NLRB appears to hold that: (a) it is perfectly appropriate for labor unions to use lies to terrorize non-English-speaking aliens; but (b) seasoned American workers are "coerced" when employers truthfully state facts regarding the closure of unionized plants.

CONCLUSION

The larger question posed by this case concerns the sort of campaign tactics which will be sanctioned in elections involving large numbers of non-English-speaking aliens. The opinion of the three-judge panel unwittingly opens the door to union scare tactics directed at highly vulnerable non-English-speaking alien voters. If all employees are fungible under *Midland* and unions can freely use lies to terrorize alien voters, the phrase "laboratory conditions" will be reduced to a cruel hoax in any election unit comprised of non-English-speaking aliens. Case Farms respectfully contends that this case should be returned to the National Labor Relations Board for thoughtful consideration of whether the *Midland* doctrine

should always be applied in full force to non-English-speaking alien voters.

Respectfully submitted,

DAVID PARKS HILLER
MILLISOR & NOBIL
4700 Lakehurst Court, Suite 135
Dublin, OH 43016-2251
Telephone: 614/799-2020
Facsimile: 614/799-2121

Attorney for Case Farms of North Carolina, Inc.

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CASE FARMS OF NORTH CAROLINA, INCORPORATED,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

NATIONAL POULTRY WORKERS ORGANIZING COMMITTEE,

Intervenor,

THE NORTH CAROLINA POULTRY FEDERATION,

Amicus Curiae.

No. 96-1402

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CASE FARMS OF NORTH CAROLINA, INCORPORATED,

Respondent,

THE NORTH CAROLINA POULTRY FEDERATION,

Amicus Curiae.

No. 96-1566

On Petition for Review and Cross-Application
for Enforcement of an Order
of the National Labor Relations Board.
(11-CA-16814)

Argued: March 3, 1997

Decided: October 23, 1997

Before WILLIAMS and MICHAEL, Circuit Judges, and GOODWIN, United States District Judge for the Southern District of West Virginia, sitting by designation.

Petition denied and order enforced by published opinion. Judge Michael wrote the opinion, in which Judge Goodwin joined. Judge Williams wrote a separate concurring opinion.

COUNSEL

ARGUED: David Parks Hiller, MILLISOR & NOBIL, Columbus, Ohio, for Petitioner. David A. Seid, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for Respondent. Laurence Edward Gold, Washington, D.C., for Intervenor. **ON BRIEF:** Frederick L. Feinstein, General Counsel, Linda Sher, Associate General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, Frederick C. Havard, Supervisory Attorney, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for Respondent. Theodore T. Green, Washington, D.C., for Intervenor. Kevin Sturm, EDWARDS, BALLARD, BISHOP, STURM, CLARK & KEIM, P.A., Spartanburg, South Carolina, for Amicus Curiae.

OPINION

MICHAEL, Circuit Judge:

Case Farms of North Carolina, Inc. petitions for review of a National Labor Relations Board order certifying the results of a union representation election held July 12, 1995, at the Case Farms poultry processing plant in Morganton, North Carolina. Case Farms contends that the election was irrevocably tainted by what it perceives as an appeal to "ethnocentric fears" made in a flier distributed by the National Poultry Workers Organizing Committee, Affiliated with the Laborers' International Union of North America, AFL-CIO (the Union). The Board overruled the company's objections to the election and now seeks to enforce an order requiring Case Farms to recognize and bargain with the Union. Because the Board was within its discretion in overruling Case Farms' objections, we deny the company's petition for review and enforce the Board's order.

I.

Case Farms operates a poultry processing plant in Morganton, North Carolina. Roughly eighty percent of the 514 plant employees who were eligible to vote in the representation election were Latino, and of the Latinos, ninety percent were Guatemalan. More than seventy percent of the eligible employees were aliens.

On May 15, 1995, approximately 200 employees at the Morganton plant began a work stoppage to protest wages and working conditions. The protesting employees "form[ed] in front of the plant," where they remained for

about an hour until they were asked to leave. J.A. 67. Three of these employees were arrested, however, apparently at the instance of Case Farms. On that first day the employees presented the company with a petition outlining their grievances, which included claims that Case Farms was paying low wages, refusing sufficient bathroom breaks, speeding up the chicken (production) line, threatening employees who sought medical attention, charging employees for certain equipment, and firing employees who registered complaints. The protesting employees later obtained a parade permit and had a "demonstration parade in front of the plant" on the third day, May 17, 1995. J.A. 67. The work stoppage ended on May 18.

Soon thereafter the Union began an organizing campaign at the plant. As part of its campaign, the Union distributed at least twelve different leaflets, most printed in English and Spanish. One of the leaflets read as follows:

> **Case Farms Doesn't Care!**
>
> This year they had three people arrested.
>
> Two years ago they had 50 people arrested.
>
> In Ohio, two years ago Case Farms fired the entire Amish workforce, and replaced them with Latinos.
>
> They did this to the Amish after years of loyal service.
>
> Why?

> Because they could pay Latinos less and treat them worse.
>
> They care more about the **chickens** than any of their workers.
>
> How are we going to prevent Case Farms from treating us like the Amish?
>
> If We Want Case Farms to Treat Us with Dignity and Respect Then We Must **Unite for Change – Vote Union YES**

J.A. 304 (bold in original) (hereinafter Amish flier). The Amish flier was also distributed in Spanish.[1] Other fliers decried current working conditions, compared Case Farms unfavorably with other poultry processors, and argued that the Union would improve the workers' situation.

On July 7, 1995, five days before the election, Jesyka Martinez, a Case Farms employee who was against the Union, got involved in a heated argument with union organizers. According to the organizers, whose testimony was credited by the Board's hearing officer, Martinez came out of the plant after work and took a leaflet from one of them. She then crumpled the leaflet, threw it to the ground, and pulled aside two of the union organizers. Martinez told the organizers that the Union was only there to cause problems. The organizers told Martinez

---

[1] According to testimony by a Case Farms witness, the Spanish version differed from the English version. While the English version states that Case Farms fired the entire Amish work force, the Spanish version allegedly states that "Case Farms fired all the workers, [and only] some of them w[ere] Amish." J.A. 131 (testimony of Jaime White).

they could not talk to her right then because they were handing out leaflets, but they would like to talk to her at another time. Martinez got into her car and left. Ten minutes later she returned and began yelling at the departing workers, telling them that the Union was just there to take their money. She told the workers not to take the Union leaflets and jerked leaflets out of the hands of some of the workers. One of the organizers then asked Martinez why, if she really cared about the workers, she had said the day before that the Guatemalan employees were "nothing but lazy bums" and "when they don't do the job, she had to do the job for them." J.A. 220. By this point a crowd of workers had gathered; estimates on the number range from forty to 300. *Compare* J.A. 230 (testimony of union organizer Elias Martinez) (estimating 40 to 50 people) *with* J.A. 171 (testimony of Jesyka Martinez) (claiming 270 to 300 people). Martinez denied making the comments and began to argue with some of the assembled workers. The police were eventually called to the scene and escorted Martinez to her car.

The representation election was held on July 12, 1995, and the Union won by a vote of 238 to 183. Case Farms filed seven objections to the election, and an extensive hearing was held to resolve the issues of fact relating to those objections. After the hearing, the Board's hearing officer issued a report finding "that the Union did not engage in objectionable conduct" and recommending that Case Farms' objections be overruled. J.A. 343. The Board adopted the hearing officer's findings and recommendations and certified the Union as bargaining representative for the employees at the Morganton plant.

In order to obtain judicial review of the Board's certification, Case Farms refused to bargain with the Union. The NLRB General Counsel brought an unfair labor practice claim against Case Farms based on this refusal to bargain. Case Farms defended by arguing that the Union had been improperly certified. The Board granted summary judgment against Case Farms and ordered the company to bargain. Case Farms petitioned this court for review of the Board's final order, and the Board cross-petitioned for enforcement of its order.

II.

Although Case Farms made seven objections concerning the July 12 election, its briefs to us focus on the Union's distribution of the Amish flier. Case Farms claims that this flier was a misrepresentation designed to generate fear of an "ethnic cleansing" among the non-English-speaking Latino aliens, such as the one allegedly experienced by the Amish. The Board found the flier did not constitute an inflammatory appeal to race or ethnicity, and therefore the flier provided no grounds for overturning the election. In considering this, we recognize that "[t]he Board's determination regarding the validity of an election 'is within the sound discretion of the Board' and 'should be reversed only when [the Board] has abused its discretion.' " *NLRB v. VSA, Inc.*, 24 F.3d 588, 592 (4th Cir. 1994) (quoting *NLRB v. Manufacturer's Pkg. Co.*, 645 F.2d 223, 226 (4th Cir. 1981)).

The Board's stated goal in regulating the conduct of representation elections is to "provide a laboratory in

which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948), *enforced*, 192 F.2d 504 (6th Cir. 1951). The Board has recognized, however, that elections "do not occur in a laboratory where controlled or artificial conditions may be established" and that, accordingly, "the actual facts [must be assessed] in the light of realistic standards of human conduct." *The Liberal Market, Inc.*, 108 N.L.R.B. 1481, 1482 (1954). This tension between the ideal and reality is evidenced by the Board's policy towards misrepresentations in campaign messages. From 1962 to 1982 the Board changed its policy concerning misrepresentations four times. *See Hollywood Ceramics Co., Inc.*, 140 N.L.R.B. 221, 224 (1962) (holding that elections may be overturned based on last-minute misrepresentations involving a substantial departure from the truth); *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311, 1313 (1977) (holding that it would no longer set aside elections based on misrepresentations); *General Knit of California, Inc.*, 239 N.L.R.B. 619, 620 (1978) (returning to the *Hollywood Ceramics* standard); *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127, 131 (1982) (returning to the *Shopping Kart* standard). In *Midland* the Board finally settled on the standard that "we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements." *Id.* at 133. The Board reached this holding in part in order to "remove[ ] impediments to free speech by permitting parties to speak without fear that inadvertent errors will provide the basis for endless delay or overturned elections." *Id.* at 132. The Board

believed that its " 'rules in this area must be based on a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it.' " *Id.* at 132 (quoting *Shopping Kart*, 228 N.L.R.B. at 1313).

Case Farms takes great pains to establish that it did not fire Amish workers from its Ohio plant, contrary to the claim of the Amish flier. Although Case Farms acknowledges that virtually all of the Amish workers had left its Ohio plant, the company asserts that the Amish quit their jobs voluntarily. This assertion is unrebutted by the Union. *Midland*, however, established that the truthfulness of campaign propaganda is generally irrelevant, and Case Farms implicitly admits that the election cannot be overturned solely because there is a false statement in the Amish flier. *See* Reply Brief for Petitioner at 8-10. Instead, the company argues that the Board has created an exception to the *Midland* rule when the propaganda at issue, in addition to being untruthful, appeals to "ethnocentric fears."

In *Sewell Mfg. Co.*, 138 N.L.R.B. 66, 70 (1962), the Board established that "a deliberate, sustained appeal to racial prejudice" could create conditions that "made impossible a reasoned choice of a bargaining representative." During the representation campaign in *Sewell* held in 1961, the employer distributed literature linking the union to the NAACP. One of the employer's fliers pictured a white man, identified as a union leader, dancing with a black woman. Underneath the picture was a story entitled: "Race Mixing Is An Issue As [Company] Workers Ballot." *Id.* at 67. The Board set aside the election after finding that "the Employer's propaganda directed

to race exceeded permissi[ble] limits and so inflamed and tainted the atmosphere in which the election was held that a reasoned basis for choosing or rejecting a bargaining representative was an impossibility." *Id.* at 72.

The Board recognized, of course, that matters of race and ethnicity will often be important to a representation campaign. It therefore held that "[s]o long . . . as a party limits itself to *truthfully* setting forth another party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals, we shall not set aside an election on this ground." *Id.* at 71-72. The Board has further affirmed and refined this standard in cases following *Sewell.* In *Baltimore Luggage Co.,* 162 N.L.R.B. 1230 (1967), *enforced,* 387 F.2d 744 (4th Cir. 1967), the Board held that the *Sewell* standard was not violated when civil rights leaders spoke out in support of a union campaign by linking the civil rights movement to the labor movement.

> Consequently, in *Sewell,* we did not lay down the rule that parties would be forbidden to discuss race in representation elections. Rather, we set aside an election because the campaign arguments were inflammatory in character, setting race against race – an appeal to animosity rather than to consideration of economic and social conditions and circumstances and of possible actions to deal with them.

Id. at 1233 (footnote omitted). The Board has made clear in the cases following *Sewell* that appeals to race or ethnicity must be "inflammatory" in order to violate the *Sewell* standard. *See Englewood Hospital,* 318 N.L.R.B. 806,

807 (1995) ("In these cases [following *Sewell*] the Board has consistently reiterated that 'the rule in *Sewell* is applicable only in those circumstances where it is determined that the "appeals or arguments can have no purpose except to inflame the racial feelings of voters in the election." ' " (quoting *Bancroft Mfg. Co.*, 210 N.L.R.B. 1007, 1008 (1974) (quoting *Sewell*, 138 N.L.R.B. at 71))).

Accordingly, a party violates the standard set forth in *Sewell* only if its campaign propaganda constitutes an inflammatory appeal to racial or ethnic sentiment. Otherwise, the propaganda is unobjectionable under the permissive *Midland* standard. "If . . . racial or sexual remarks . . . do not form the core or theme of the campaign . . . and if the remarks are not inflammatory, they should be reviewed [only] under the standards applied to other types of misrepresentation." *State Bank of India v. NLRB*, 808 F.2d 526, 541 (7th Cir. 1986) (alterations in original) (quoting *Peerless of Am., Inc. v. NLRB*, 576 F.2d 119, 125 (7th Cir. 1978)). *See also KI(USA) Corp. v. NLRB*, 35 F.3d 256, 260 (6th Cir. 1994) (noting that the truthfulness and relevance of campaign propaganda is at issue only after the petitioning party "establishes a prima facie case that an election was unfair due to an 'inflammatory appeal' to racial feelings"); *NLRB v. Utell Int'l, Inc.*, 750 F.2d 177, 179 (2d Cir. 1984) ("We also agree with the other circuits that have passed on the issue that the *Sewell* test for truth and relevancy does not apply here but rather is applicable only to inflammatory racial appeals. In this view, false but non-inflammatory statements are reviewed according to the usual test for misrepresentations."); *NLRB v. Bancroft Mfg. Co., Inc.*, 516 F.2d 436, 442 (5th Cir. 1975) (holding that if propaganda is "racially

inflammatory," then "the test for truth and relevancy must be made as *Sewell* describes;" if the propaganda is not inflammatory, then "the statements should be reviewed under the familiar standards applied to any other type of alleged material misrepresentation").

Thus, the truth or falsity of the Amish flier may be put aside because, as the Board found, "the materials distributed by the [Union] did not constitute an inflammatory appeal to race or ethnicity." J.A. 347 n. 1. The flier merely claims that the Amish workers at Case Farms' Ohio plant were fired and replaced with Latino workers. It does not claim that the Amish were fired because Case Farms was prejudiced against the Amish; instead, it explicitly states that the Amish were fired because Case Farms "could pay Latinos less and treat them worse." The flier then asks, "How are we going to prevent Case Farms from treating us like the Amish?" It answers, "If We Want Case Farms to Treat Us with Dignity and Respect Then We Must Unite for Change – Vote Union YES." J.A. 304. The flier makes no claim that Case Farms is bigoted or prejudiced against the Amish, nor does it attempt to "inflame" the employees against another racial or ethnic group.

The statements in the Amish flier are quite different from the appeals held to be inflammatory in other cases. The majority of those cases involve appeals to the racial or ethnic prejudices of the workers themselves, often in the form of slurs or insults. *See, e.g., M & M Supermarkets, Inc. v. NLRB*, 818 F.2d 1567, 1569 (11th Cir. 1987) (employee referred to owners as "damn Jews" and said "[u]s Blacks were out in the cotton field while they, the

damned Jews, took their money from the poor hardworking people"); *NLRB v. Eurodrive, Inc.*, 724 F.2d 556, 557 (6th Cir. 1984) (union organizer said that the white employees needed the union to protect their jobs because they were not protected by equal opportunity laws; he also promised that a white employee fired for racial harassment of a black co-worker would be rehired if the union won); *NLRB v. Katz*, 701 F.2d 703, 705 (7th Cir. 1983) (at a union rally a priest said the owners "are Jewish and they're getting rich while we're getting poor," and "why should we make them rich because Jewish people are rich and we are poor and killing ourselves for them;" an employee also alleged that "the Jews marched in Skokie to keep the Blacks out"); *NLRB v. Silverman's Men's Wear, Inc.*, 656 F.2d 53, 55 (3d Cir. 1981) (union representative called a company vice president a "stingy Jew" at an employee meeting); *YKK (U.S.A.), Inc.*, 269 N.L.R.B. 82, 84 (1984) (repeated references to management as "Japs" and statements such as "we beat the Japs after Pearl Harbor and we can beat them again"). *Cf. NLRB v. Sumter Plywood Corp.*, 535 F.2d 917, 924-25 (5th Cir. 1976) (finding that "the major concern" for the *Sewell* line of cases "is that workers of one race not be persuaded to vote for or against a Union on the basis of invidious prejudices they might have against individuals of another race"). Attempts to portray an employer as bigoted have also been found to be inflammatory in certain extreme cases. *See Carrington South Health Care Ctr., Inc. v. NLRB*, 76 F.3d 802, 807 (6th Cir. 1996) (cartoons in a union flier "use[d] obvious images of bondage or violence visited upon racial minorities by a white majority: a white man purchases a group of black . . . workers; a group of workers

labor as beasts of burden, pulling their superiors in a wagon while being whipped; a black worker is to be summarily executed by a white overlord"); *KI (USA) Corp. v. NLRB*, 35 F.3d 256, 257 n. 1 (6th Cir. 1994) (union flier reproduced comments of a Japanese businessman calling American workers "lazy," "uneducated," and "half-witted;" flier implied that businessman's views reflected those of the Japanese management); *Zartic, Inc.*, 315 N.L.R.B. 495, 496 (1994) (union falsely accused employer of giving money to the Ku Klux Klan). The Amish flier fits into neither of these categories: it makes no appeal to racial prejudice, and it does not accuse Case Farms of bigotry. The Amish flier cannot be considered inflammatory.

Case Farms tries several approaches to elude this somewhat obvious result, none of which are successful. It attempts to construe the Amish flier as saying that "[t]he laws of the United States did not prevent Case Farms from successfully engaging in the industrial equivalent of 'ethnic cleansing' of a religious sect in Ohio" and that "[a]bsent Union protection, Case Farms will engage in a similar purge of Hispanics in North Carolina." Brief for Petitioner at 22. This reading, however, differs wildly from the plain meaning of the flier itself. There is no allegation in the flier that the Amish were fired as part of some program of "ethnic cleansing."[2] As we noted above,

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[2] The term "ethnic cleansing" refers to the elimination of a certain ethnic group from a country or region, accomplished by forced withdrawals or genocide. *See Editorial, Ethnic Cleansing, Boston Globe*, Oct. 22, 1995, 1995 WL 5959713. The hearing officer found that Case Farms' use of the term was "misplaced, misleading, and inappropriate." J.A. 330.

the flier explicitly states that the Amish were fired because Latinos could be paid less and treated worse. Moreover, Case Farms cannot explain why the firing of Amish workers and their replacement with Latinos would incite fear of "ethnic cleansing" amongst a group of Latinos.

If there is any "ethnic" content to the flier at all, it is at most an appeal to Latinos in North Carolina to avoid the fate of Latinos in Ohio, namely, being paid less and treated worse. Case Farms makes no claim that such an appeal would violate the *Sewell* standard, nor could it. Both the Board and the courts have upheld more direct appeals to ethnic solidarity. In *State Bank of India,* for example, a union letter to employees claimed that the bank "is trying to keep depressed conditions and low wages for its employees, because most of you are of Indian nationality and other minority groups." *State Bank of India,* 808 F.2d at 541. The court found that this appeal was not inflammatory because it "urges the employees to vote for the union *not* by appealing to and arousing their racial prejudice, but rather by contending that the Bank itself was taking advantage of their inability to protect their own interest because of their minority status." *Id.* Similarly, in *Bancroft* a union organizer warned black employees that "if the blacks did not stay together as a group and the Union lost the election, all the blacks would be fired." *Bancroft,* 516 F.2d at 440. The Fifth Circuit found this accusation to be untrue because there was "no evidence that the Company intended to or did in fact treat its black employees unfairly." *Id.* at 442. Nevertheless, the court upheld the election results because "none of the disputed statements could be characterized as

racially inflammatory." *Id.* at 443. *See also NLRB v. Herbert Halperin Distrib. Corp.*, 826 F.2d 287, 289, 293 (4th Cir. 1987) (union supporters' remarks, such as "the white guys should get together and help the black guys" and "those goddamn white boys – they're gonna vote no with [the employer], they won't support the blacks," did not "suggest an atmosphere inflamed by racial tension nor do they represent a deliberate attempt by the union to divert the employees from legitimate issues by insinuating an irrelevant appeal to race"); *Utell*, 750 F.2d at 178-79 (accusations that the company and company officers were racist "were not deliberate inflammatory appeals designed to incite racial hatred"); *NLRB v. Baltimore Luggage Co.*, 387 F.2d 744, 747 (4th Cir. 1967) (appeals by civil rights leaders linking civil rights to unionization were a "legitimate tactic" because they were "clearly not for the purpose and could not have had the effect of exacerbating racial prejudices"). *Cf. Sumter*, 535 F.2d at 929 ("[S]ome degree of 'consciousness-raising' will be permitted in union organizing campaigns among ethnic groups which have historically been economically disadvantaged, as long as the ethnic message becomes neither the core of the campaign nor inflammatory.").

Case Farms claims that the case of *Zartic, Inc.*, 315 N.L.R.B. 495 (1994), "virtually mirrors" this case and therefore offers relief. Brief for Petitioner at 13. Like this case, *Zartic* also involved an attempt to organize poultry processing plants that had a substantial number of Latino employees. During the organizing campaign, an employee secretly taped a discussion with a management official, who claimed that another official had called the Latino employees "the closest thing to animals they could

be." *Id.* at 495. The union obtained a copy of the tape and played it at several organizational meetings. An employee then brought up the official's remarks at a question-and-answer session held by management; the employee, however, initially attributed the remarks to the wrong official, who was present at the session and denied making them. After additional questioning and further denials, a disturbance ensued and the meeting was terminated. Sometime after this disturbance, the union distributed two leaflets relating to a strike held ten years earlier at another of the employer's processing plants. One leaflet reproduced an article about the involvement of the Ku Klux Klan in the strike; about half of the space allotted to the article contained a picture of Klansmen in a picket line. A second leaflet reproduced an article about a Latino employee at the other plant who had been mysteriously killed about the same time as the strike. At a meeting during which these leaflets were distributed, a union organizer falsely claimed that the employer had given money to the Klan. In actuality, the Klan had been picketing *against* the employer, and the employer had obtained an injunction limiting the Klan's activities. The organizer also claimed that the Klan had killed the Latino employee; there had been rumors to this effect but no definitive proof. Based on these events, the Board found that the union's representation campaign "constituted a sustained appeal to the ethnic sensibilities of the Employer's Hispanic employees which was inflammatory, gratuitous, and irrelevant to any bona fide campaign issue." *Id.* at 498. The Board therefore refused to certify the union's election victory and directed that a new election be held.

According to Case Farms, the Union campaign failed to meet the standards for propaganda set forth in *Zartic*. First, Case Farms claims that the Union's use of Jesyka Martinez's alleged derogatory comments about Guatemalans (they were "lazy bums," etc.) parallels the use of the management official's comments about Latinos in *Zartic*. Second, it claims that the Amish flier is similar to the fliers used in *Zartic*. The circumstances in *Zartic*, however, are quite different than the circumstances in this case. First, the derogatory statements were used in different ways in the two cases. The union in *Zartic* repeatedly and deliberately used the official's statements to inflame ethnic sentiment. *See Zartic*, 315 N.L.R.B. at 496 ("[I]t is clear on this record . . . that the Union used the tape repeatedly as an organizing tool in the weeks immediately preceding the election."). In this case, however, the union organizers (in quoting Martinez) were responding to a spontaneous encounter with an employee. There is no evidence that the organizers had planned ahead of time to take advantage of Martinez's remarks, nor did they make repeated use of the remarks. Moreover, the remarks at issue in *Zartic* were made by management, while in this case they were made by an employee.

The differences between the Amish flier and the fliers in *Zartic* are even more significant. In *Zartic* the union produced fliers with large pictures of the Klan, falsely linked the employer to the Klan, and linked the Klan to the murder of an employee. In this case, the Union claimed that Case Farms had fired Amish workers and replaced them with Latinos. The appeals in *Zartic* were designed to make the employees believe that the employer supported a bigoted and allegedly murderous

organization, when in fact the employer had fought against that organization. In the Amish flier in this case, the appeal was designed to make the employees believe that one group of workers had been fired because the employer could pay another group of employees less and treat that group worse. The union's campaign in *Zartic* was a "sustained appeal to the ethnic sensibilities of the Employer's Hispanic employees which was inflammatory, gratuitous, and irrelevant to any bona fide campaign issue." *Id.* at 498. The Amish flier cannot be considered such an appeal.[3]

As the Board recognized in *Sewell*, the ultimate question concerning representation campaigns is whether a party has "created conditions which made impossible a reasoned choice of a bargaining representative." *Sewell*, 138 N.L.R.B. at 70. Although there is evidence that a claim made in the Amish flier was a misrepresentation, the Board has recognized that employees are "mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it." *Midland*, 263 N.L.R.B. at 132 (quoting *Shopping Kart*, 228 N.L.R.B. at 1313); *cf. Herbert Halperin*, 826 F.2d at 292 ("[W]e think

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[3] Case Farms also claims that *Zartic* represents a departure from the *Sewell* standard. According to Case Farms, the *Sewell* line of cases only concern appeals to racial prejudice, while *Zartic* created a new prohibition against appeals to ethnic fear. *See* Reply Brief for Petitioner at 6-7. It is clear from the *Zartic* opinion, however, that the Board relied on *Sewell* for its analysis. *See Zartic*, 315 N.L.R.B. at 497 (citing *Sewell* as the "seminal case for analysis"); *id.* at 498 (stating that the leaflets and the union organizer's contemporaneous comments "pushed the organizing campaign past the limits which *Sewell* permits").

that it is unrealistic to expect every election dialogue to be completely sanitized."). The Union's organizing campaign was based on the issues that first caused employee unrest at the Morganton plant: wages and working conditions. The fliers distributed by the union in support of its campaign reflect these concerns. *See, e.g.*, J.A. 309-10 (stating that every worker brings in $20,000 in profit to Case Farms and arguing that Case Farms can afford to treat its workers better); J.A. 314-15 (describing worker mistreatment and advocating change); J.A. 319-20 (describing the benefits that union dues provide); J.A. 321 (comparing wages and working conditions between Case Farms and other poultry processors); J.A. 322-23 (arguing that the union would make real changes in working conditions); J.A. 325 ("It is only with the union that we can protect the rights for which we have sacrificed and fought through work stoppages and arrests."). The Amish flier was not an inflammatory appeal to ethnic sentiment. It instead argued for employee solidarity to prevent job loss and mistreatment. That is a legitimate area for discussion in an organization campaign. *See Coca-Cola/Dr. Pepper Bottling Co.*, 273 N.L.R.B. 444, 445 (1984) ("The question of whether employees have been unfairly treated, for whatever reason, is always a legitimate topic of discussion in a union campaign."). We conclude that the Board was well within its discretion in denying Case Farms' objection concerning the Amish flier.

III.

Case Farms also asserts that the Board erred in overruling its final objection, which stated that the "cumulative effect of the Union's misconduct" described in its

first six objections deprived the employees of an uncoerced choice. Brief for Petitioner at 43. Along with the objection about the Amish flier, Case Farms' five other objections alleged Union misconduct such as a threat to call the Immigration and Naturalization Service as well as other intimidation tactics. The hearing officer examined the evidence of this alleged misconduct and recommended that all the objections be overruled. The Board agreed. Case Farms does not now appear to contend that the Board reached the wrong result on the five other objections, but rather the company claims that the hearing officer failed to examine the cumulative effects of the objections. However, the officer clearly stated that "[b]ased on the foregoing, and the record as a whole, I find that the Union did not destroy the laboratory conditions for an election by a combination of the above discussed events or by any additional acts of misconduct." J.A. 343. Since her extensive analysis of the individual objections demonstrated that they were without merit, there is no reason to conclude that they compel a different result when considered as a whole.

IV.

We conclude that Case Farms presents no grounds for overturning the results of the July 12, 1995, representation election. We therefore deny Case Farms' petition for review and grant the Board's application for enforcement.

PETITION DENIED AND ORDER ENFORCED.

WILLIAMS, Circuit Judge, concurring:

I agree with the Majority's conclusion that the Amish flier did not constitute an inflammatory appeal to race or ethnicity. *See* Majority Op. at 8-9. Because the Amish flier passes muster under the permissive standard that this Court has adopted for misrepresentations, I also agree that the Board's order must be enforced. *See* Majority Op. at 15. I write separately, however, to express my concern with the Board's apparent disregard for the decisions of the Circuit Courts.

In its order, the Board specifically adopted the findings made by the hearing officer (J.A. at 346-47), which included a finding that "[t]he current case is . . . on point with *KI (USA) Corp.*, 309 N.L.R.B. 1063 (1992)" (J.A. at 339). Interestingly, the Sixth Circuit, using the identical analysis employed by the Majority, denied enforcement of the Board's order in *KI (USA) Corp.*, 309 N.L.R.B. 1063 (1992), because it found that the Union improperly appealed to racial prejudice during its election campaign. *See KI (USA) Corp. v. NLRB*, 35 F.3d 256, 259-60 (6th Cir. 1994). Presumably, the Board continues to believe that its order in *KI (USA) Corp.*, and not the subsequent decision of the Sixth Circuit, is correct because it nevertheless concluded that the Amish flier "did not constitute an inflammatory appeal to race or ethnicity" (J.A. at 347 n.1).

I realize, of course, that outside the Sixth Circuit the Board is free to argue that its decision in *KI (USA) Corp.*, 309 N.L.R.B. 1063 (1992), was correctly decided. The Board is not free, however, to automatically assume that its decisions, whether enforced or not, are the law in this Circuit. *See, e.g., Industrial Turnaround Corp. v. NLRB*, 115

F.3d 248, 254 (4th Cir. 1997) (noting that NLRB erred in assuming that its decision in *Deklewa* was the law in our Circuit); *United States Dep't of Energy v. FLRA*, 106 F.3d 1158, 1165 (4th Cir. 1997) (Luttig, J., concurring) (reproving the FLRA for refusing to follow our Circuit's precedent). Because the hearing officer relied almost exclusively upon an unenforced order, and because neither the hearing officer nor the Board cited one decision by this Court, I cannot help but question what the Board considers binding in this Circuit. In any event, I believe that the facts in the current case are distinguishable from the facts in *KI (USA) Corp.*, 309 N.L.R.B. 1063, 1992 WL 390113 (1992). If the facts were "on point," as found by the hearing officer and adopted by the Board, I would deny enforcement of the Board's order for the same reason the Sixth Circuit declined to enforce the Board's order in *KI (USA) Corp. v. NLRB*, 35 F.3d 256, 259-60 (6th Cir. 1994).

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

(Filed December 19, 1997)

No. 96-1402
11-CA-16814

CASE FARMS OF NORTH CAROLINA, INCORPORATED

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD;

Respondent

NATIONAL POULTRY WORKERS ORGANIZING COMMITTEE

Intervenor

THE NORTH CAROLINA POULTRY FEDERATION

Amicus Curiae

No. 96-1566
11-CA-16814

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

CASE FARMS OF NORTH CAROLINA, INCORPORATED

Respondent

THE NORTH CAROLINA POULTRY FEDERATION

Amicus Curiae

On Petition for Rehearing with Suggestion
for Rehearing In Banc

Case Farm's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
Patricia S. Connor
CLERK

NOT INCLUDED IN BOUND VOLUMES

GBC

Morganton, NC

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE FARMS OF N.C., INC.

Employer

and

Case 11-RC-6089

NATIONAL POULTRY WORKERS ORGANIZING COMMITTEE, AFFILIATED WITH THE LABORER'S INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held July 12, 1995, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Direction of Election. The tally of ballots shows 238 for and 183 against the Petitioner, with 24 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's

findings and recommendations,[1] and finds that a certification of representative should be issued.[2]

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for National Poultry Workers Organizing Committee, Affiliated With The Laborers' International Union of North America, AFL-CIO and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees including processing employees, maintenance employees, garage

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[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

In adopting the hearing officer's findings, we note that *KI(USA) Corp.*, 309 NLRB 1063 (1991), was not enforced by the Court of Appeals. *KI(USA) Corp. v. NLRB*, 35 F3d 256 (6th Cir. 1994). Here, the materials distributed by the Petitioner did not constitute an inflammatory appeal to race or ethnicity. We therefore find *KI(USA) Corp.* to be distinguishable.

We correct the hearing officer's description of Ken Wilson's testimony about the receipt of complaints from employees other than Brenda Talley, Jesyka Martinez, and Fanny Crawford. Wilson testified that he had received other complaints, but could not recall their nature. This correction has no effect on the hearing officer's analysis.

[2] In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendation to overrule the Employer's objections 3 and 5.

employees, waste water employees, long haul drivers, and trainers, employed at the Employer's Morganton, North Carolina, facilities, excluding hatchery, feed mill and live haul employees, office clerical employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C., December 12, 1995.

William B. Gould IV, Chairman

Margaret A. Browning, Member

Charles I. Cohen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

"(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board –

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a):

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.